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photograph of the church at Austerfield, in which Bradford worshipped, and a photograph of that part of the Baptismal Register which gives the name of Bradford and the date of his baptism. These were given him by Lord Houghton, and he intended to present them to the Society if it did not already possess them. He also spoke of a portrait of Franklin by Gainsborough, on exhibition at the South-Kensington gallery, which he had never seen before. He said he should procure photographs of it to bring home.

Mr. DEANE then exhibited the photographs of the Austerfield church and of the Baptismal Register referred to, which had been presented to him last year by Lord Houghton's friends, — the accomplished and hospitable family of Mr. Charles Lowther, who now reside at "Bawtry Hall."

Mr. R. FROTHINGHAM, the Treasurer, announced a bequest to the Society of two thousand dollars, from the late Henry Harris; and that the sum had been received by him from Mr. Harris's executor, Mr. Minot.

SEPTEMBER MEETING.

A stated monthly meeting of the Society was held this day, Thursday, September 12, at eleven o'clock, A.M.; Colonel ASPINWALL, Vice-President, in the chair.

The Librarian announced donations (for the past two months) from the Commonwealth of Massachusetts;

the State of Ohio; the State of Vermont; the City of Boston; the American Antiquarian Society; the American Numismatic and Archæological Society; the American Philosophical Society; the Chamber of Commerce of the State of New York; the Chicago Historical Society; the Essex Institute; the Long-Island Historical Society; the Massachusetts Medical Society; the Mercantile-Library Association, of Boston; the New-England Historic-Genealogical Society; Oberlausitzische Gesellschaft der Wissenschaften zu Görlitz; the State Historical Society of Iowa; the Suffolk Institute of Archæology and Natural History; the Trustees of Bowdoin College; the Proprietors of the "Heraldic Journal"; the Editors of the "Advocate"; the Union Congressional Committee; John Appleton, M.D.; William S. Appleton, Esq.; Mr. George Arnold; Francis C. Barlow, Esq., the Secretary of State of New York; Rev. Caleb D. Bradlee; Mr. William G. Brooks, Jr.; Austin J. Coolidge, Esq.; Mr. Edward S. Coombs; Charles Drowne, Esq.; John H. Ellis, Esq.; Rev. S. Hopkins Emery; Professor Daniel C. Gilman; William F. Goodwin, Esq.; Clement H. Hill, Esq.; Franklin B. Hough, M.D.; Benjamin P. Johnson, Esq.; Professor John Johnston; Mr. James S. Loring; Mr. John Lovell, of Montreal; Hon. George Lunt; Selden E. Marvin, the Adjutant-General of New York; Joel Munsell, Esq.; Messrs. Rand and Avery; Messrs. Sidney S. Rider and Brother; Thomas E. Sawin, Esq.; Rev. Edwin M. Stone; J. Hammond Trumbull, Esq.; Hon. Henry Wilson; and from Messrs. Brigham, C. Brooks, W. G. Brooks, Deane, Denny, Ellis, Green, Hoar,

Latham, Lawrence, S. Lincoln, Metcalf, Parkman, C. Robbins, Wheatland, Whitmore, and Winthrop, of the Society.

The chairman called the attention of members to a number of volumes upon the table, which had been presented by Mr. John Lovell, a bookseller and publisher in Montreal, through Mr. George Arnold, an assistant in the Library of this Society.

Voted, that the thanks of the Society be returned to Mr. Lovell for this valuable donation to the Library.

Theodore D. Woolsey, President of Yale College, was elected a Corresponding Member.

Dr. ELLIS read some extracts from a letter he had received from the President, Mr. WINTHROP, dated from Munich and Zurich, the last date being August 20, 1867, in which he described a visit to the celebrated foundry at Munich, and spoke of some of the statues of distinguished men which he saw there.

Mr. DEANE read the following paper, written by Dr. John Appleton, the Assistant Librarian, on the picture in the Society's Cabinet, usually called the portrait of the Rev. John Wilson, clearly showing that it ought not to be so regarded.

Alleged Portrait of the Rev. John Wilson, with some notices of other early portraits.

Among the portraits of distinguished New-England clergymen in the collection of the Society, is one which has generally been considered as an original of John Wilson, the first teacher, and afterwards pastor, of the Church in Boston; but certain circumstances tend to discredit the

authenticity of this painting as the *effigies* of that eminent divine.

The picture is apparently not of a date corresponding with the lifetime of Wilson, but must rather be referred to the latter part of the seventeenth century. It represents a clergyman, somewhat advanced in life, the features generally of a feminine character, and the countenance indicating ill-health. He wears what is apparently a periwig, of dark brown hair, and is clad in "canonicals," or the gown and bands in which the English clergy of that period are generally represented. It may be remarked, that in authentic portraits of the ministers of New England, contemporary with Wilson, which have come down to us, as those of Richard Mather, John Davenport, and others (among which I do not include that supposed by some to represent John Cotton), the subjects are generally painted in a dress not unlike the ordinary costume of laymen of that age, without any distinctive mark of the clerical profession; and it seems hardly probable that the portrait of Wilson would have been an exception to this usage.

The picture has apparently been carefully restored within a few years, and transferred to new canvas; but no vestige of any date or inscription, indicating the name of the artist or of the person represented, can be discovered on any part of the painting.

The portrait was presented to the Society by the late Henry Bromfield, Esq., and is said to have belonged to Edward Bromfield, who married a grand-daughter of Wilson. The painter appears to have been of more than ordinary ability.

The personal appearance of Wilson is differently represented by his biographers. Johnson, in his "Wonder-working Providence," speaks of his aspect as that of a "weak, sorry man." Dr. Eliot, in his "New-England Biographical Dictionary," says, that on his arrival in this country, he "had a large share

of health and vigor." The Rev. A. W. McClure, in a notice of this reputed portrait of Wilson,* inclines to the belief that, from its cadaverous aspect, it was painted after his decease; but, if this be the fact, it was probably not executed until many years after that date, and cannot therefore be relied on as a likeness.

Cotton Mather, in his "*Johannes in Eremo*," published in 1695, asserts directly that Wilson would never consent to have his portrait painted. In the work just mentioned, in the part entitled "*Memoria Wilsoniana*," the author says, "But from the like Humility it was, that a good kinsman of his, who deserves to live in the same story, as he now lives in the same Heaven with him, namely, Mr. *Edward Rawson*, the Honoured Secretary of the *Massachusett* Colony, could not, by all his Intreaties perswade him to let his Picture be drawn; but still refusing it, he would reply, What! such a poor, vile Creature as I am! Shall my Picture be drawn? I say, No; it never shall! And when that Gentleman introduced the Limner, with all things ready, vehemently importuning him to gratifie so far the Desires of his Friends, as to sit a while, for the taking of his *Effigies*, no Importunity could ever obtain it for him. However, being bound in Justice to employ *my Hand*, for the Memory of that Person, by *whose Hand* I was my self baptised, I have made an Essay to draw his Picture, by this Account of his Life." †

The Quaker, John Whiting, in his "Truth and Innocency Defended," in answer to Mather, and in one of his bitter invectives against "Priest Wilson," alludes to this statement concerning him; "whom," Whiting says, "he [Mather] commends so much, and in particular, *that he would never suffer his Picture to be drawn* (perhaps, lest he should resemble bloody *Bonner*, as much in his Features as in his Mind), which, however is pretty well drawn in the former

* "Lives of the Chief Fathers of New England," vol. ii. p. 171.

† *Johannes in Eremo*, p. 41.

book, and somewhat touched here, that, like Hercules, by his Foot any may judge of the Proportion of his Body." *

Without raising the question of the general accuracy of Cotton Mather's historical statements, we must suppose, that, had an original portrait of Wilson been extant in Boston in 1695, less than thirty years after his death, it must have been generally known in the town, and to Mather. Nor is it probable that, seven years after, at the date of the publication of his "Magnalia," the author would have repeated the statement, without correction or qualification, while he was on intimate terms with Edward Bromfield, to whom the portrait in question is said to have belonged; and at whose house Mather must often have seen it, had it been in the possession of his friend.

An incorrect engraved copy of the picture has been executed for Drake's "History of Boston," as the portrait of Wilson.

If the painting cannot be properly considered an authentic portrait of the first minister of Boston, the question may be asked, Who was the original of this portrait, so long in the possession of the Bromfield family, and associated by tradition with the name of Wilson? I fear that this query must, for the present, remain unanswered. From its having been preserved for so many years by this family, there would seem to be a possibility of its being the portrait of the Rev. Samuel Danforth, of Roxbury, the son-in-law of Wilson; or, more probably, that of his son Samuel, of Taunton, whose sister was the wife of Edward Bromfield. But I have little doubt that the picture was painted in Europe.

The resemblance of the features to those of some members of the Mather family, with other circumstances, had at one time almost led me to hazard the suggestion, that it might be the portrait of Nathaniel Mather, of Dublin (the third son

* pp. 79, 80.

of Richard), sent by him to his brother Increase, in 1682; but certain remarks in his letters, contained in the Mather Papers, belonging to the New-England Library, and now in the course of publication by this Society, lead me to a different conclusion.

By a curious coincidence, it would appear that a painting in the gallery of the American Antiquarian Society, which was exhibited at the National Sailors' Fair in this city, in 1864, as a portrait of Samuel Mather, the elder brother and predecessor of Nathaniel at Dublin,* probably represents some other member of the family; and may possibly be the missing portrait of Nathaniel, painted in 1682, and sent as a present to his brother Increase, in the autumn of that year. It appears also from the statement of Nathaniel Mather, not many years after the death of Samuel, that no portrait of the latter was ever painted during his life.

In a letter without date, but probably written in 1679, in reply to a request of Increase Mather for the portraits of his

* The following letter from Samuel F. Haven, Esq., Librarian of the American Antiquarian Society, gives a full description of the portrait referred to, hitherto supposed to be that of Samuel Mather: —

AMERICAN ANTIQUARIAN SOCIETY,
Worcester, Mass., Aug. 17, 1865.

MY DEAR SIR, — Returning home, after an absence of several weeks, I find your letter of Aug. 3 on my table. The portrait to which you refer is one of the series that came to this Society from Mrs. Hannah Mather Crocker. It was re-lined some twenty-five years ago, and if there was any writing on the back (which I think could not have been the case, or it would have been preserved), it has been covered. I know of no other authority than tradition for regarding it as the portrait of the Rev. Samuel Mather of Dublin. It represents a man about forty years of age, with a fresh, oval face, rather long than otherwise, and a white horsehair wig. He has no beard. The motto "*Vivere est cogitare*" is painted in prominent letters on the right side of the picture, in a line with the chin.

"VIVERE EST
COGITARE"

The face is a manly and healthy one, not particularly intellectual in expression, yet intelligent. There are bands on the neck. The dress of the figure is not very distinguishable.

I do not remember to have seen a portrait of Nathaniel Mather, and do not know where one may be found.

Yours very truly, S. F. HAVEN.

DR. JOHN APPLETON.

brothers Samuel and Nathaniel, the surviving brother in Dublin writes, "My brother Samuel's picture is not to be had. It was never taken, that I can hear of, during his life; neither is mine, and therefore I know not how to send you either of them."

Under date of March 2, 1680–81, after mentioning the receipt of the portrait of Increase, sent by him from Boston, Nathaniel Mather continues, "I cannot yet send you my picture as you desire. I cannot hear of any artist in this city that can do it well, except one; but he is too dear, not taking less than ten pounds, which is more than I am able to bestow on such an account. If I can hear of any that will do it on tolerable terms, I will, to gratify you, get it done for you."

On the 9th of May, 1682, he writes, "I must goe out, partly to sit for the drawing of my picture for you."

In the summer of this year, Nathaniel Mather was prostrated by a severe attack of disease; and during his convalescence he writes, (under date of July 8th,) "I got my picture for you just before this illness took me. But it needs mending, the hair being too gray, and the face too fat for mine. If God gives me health, I shall get it done, and then it will be ready for you."

At length, on the 7th of November of the same year, he writes to his brother, "You will receive by this vessel, Mr. Britton, my picture. I think it is well done, and they that have seen it say it is; and you will say it had need to be well done, for it cost me three guineas, that is, 3^{li} 9^{s} besides the case and the frame. Such as it is, you are welcome to it."

It is to be noticed, that this portrait of Nathaniel Mather is not described as such, among the Mather portraits in the collection of the American Antiquarian Society at Worcester, nor have I been informed that it is in the possession of any person connected with the family. It is possible that the portrait described as that of Samuel Mather may be the "*vera effigies*" of Nathaniel, referred to in the correspondence.

The fact seems to be conclusively established, that there was some one exercising the art of a "limner" in Boston before 1667, as appears from Cotton Mather's statement in relation to Wilson.

The portrait of Dr. John Clark, now in the Cabinet of this Society, has inscribed upon it his age when it was taken, viz., "Aº. Ætatis Svæ, 66, Ann. Suo." Clark died in 1664, and appears to have resided in Boston for many years before that date.

Increase Mather's portrait was painted in Boston, in 1679 or 1680, and was sent by him to his brother Nathaniel, in Dublin, as is stated in their correspondence.

The full-length portraits of Henry Gibbs (afterwards minister of Watertown), and of Margaret, his sister, children of Robert Gibbs of Boston, are still extant, and have inscribed upon them the ages, respectively, of the children, viz. one and a half and seven years, with the date (1670) of the painting. The correspondence of the inscription with their age at this time sufficiently establishes their identity, as does the fact that they have remained in the possession of the descendants of Henry Gibbs to the present time. These portraits must have been painted in Boston.

Other facts might be brought forward, corroborative of the evidence we have that there were artists resident in New England many years before the earliest works of Peter Pelham, in America, were produced.

In March, 1684 (to refer again to the Mather Papers), Nathaniel Mather writes to his brother Increase, as follows: "This I send by Mr. Joseph Allen. . . . He was bound prentice to an ironmonger, but hath so strong a naturall byass to ingenious handicrafts that hee is thereby mastered, & indeed so wholly carryed, that hee cannot thrive at buying & selling, but excells in those other things, & thence hath acquired good skill in watchmaking, clockmaking, graving, *limning;* [&] that by his owne ingenuity & industry chiefly, for he

served an apprentiship faythfully to another trade. His design in comeing to New England is that hee bee under a necessity of earning his bread by practising his skill in some of those things."

This letter of introduction was evidently delivered to Mather. I have seen no certain account of the residence of this Joseph Allen in Boston. A person of the same name was one of the "undertakers," at the formation of Brattle-Street Church, in 1698; but I have not been able to determine his occupation. It is very probable, however, that the young man who emigrated from Dublin did exercise his art of "limning" in Boston, as well as the other accomplishments which his ingenuity had led him to acquire.

Professor WASHBURN, referring to a discussion before this Society, some time since, as to whether many of the aged persons called "centenarians" can really be regarded as having lived to that extreme age, mentioned the case of an old man then living in Leicester, in this State, by the name of Piper, well known to be one hundred and four years old.

Mr. PAIGE also spoke of an aged woman, the grandmother of Mr. James W. Paige of this city, who died some years since, at the age of one hundred and two years.

Dr. ELLIS expressed the hope, that the Society would be able at each meeting this winter to secure a paper from a member on some interesting historical subject. There was one theme which he suggested as worthy of attention, — a subject forming a part of our own history, — which he felt had not yet been properly treated; and he was almost tempted to undertake it himself if no one else would. He referred to the original purpose of our

Puritan forefathers in coming to this wilderness. Dr. Ellis indicated his views upon this interesting portion of our history; and, at the close of his remarks, a wish was expressed that he would pursue the subject, and write out his views in full.

Mr. FOLSOM spoke of a brief journal of an expedition to "Crown Point," in 1775, written by Captain Nathaniel Folsom, which he had had the privilege of inspecting, and which he hoped to exhibit at the next meeting.

Dr. ELLIS read a letter from Judge Thomas, saying that the Memoir of Judge Shaw, which had been assigned to him by the Society, was written; and he asked the privilege of publishing it first in the "American Law Review," when he would enlarge it for the Proceedings of the Society.

Voted, that the request of Judge Thomas be granted.

SKETCH

OF THE

LIFE AND JUDICIAL LABORS

OF

CHIEF-JUSTICE SHAW.

BY BENJAMIN F. THOMAS.

LEMUEL SHAW was born in Barnstable, Mass., on the 9th of January, 1781, within three months from the time when the Constitution and frame of government, under which his life was to be spent, and which his judicial labors were to illustrate, went into operation. His father and grandfather were clergymen. His grandfather, John Shaw, the minister of Bridgewater, educated four sons at Harvard College, all of whom became Congregational ministers. Of these, the Rev. Oakes Shaw, the father of Lemuel, was settled in the West Parish in Barnstable, in 1760, and continued in the pastorate till his death in 1807. That he was faithful to his people, and that they loved and honored him, this long connection would show; though we are not to forget, that pastors were not then settled on horseback, with a view to early removal, and that "Providence" did not then so often call rising young ministers from small rural parishes to opulent city ones.

The son always spoke of his father with the highest veneration and respect; never without emotion. At the centennial celebration at Barnstable in 1839, more than thirty years

after his father's death, he thus touched upon a subject always near to his heart: —

"Almost within sight of the place where we are, still stands a modest spire, marking the spot where a beloved father stood to minister the holy word of truth and hope and salvation to a numerous, beloved, and attached people, for almost half a century. Pious, pure, simple-hearted, devoted to and beloved by his people, never shall I cease to venerate his memory, or to love those who knew and loved him. I speak in the presence of some who knew him, and of many more who, I doubt not, were taught to love and honor his memory, as one of the earliest lessons of their childhood."

The mother of Mr. Shaw, was Susannah Hayward, of Braintree. She was the sister of Dr. Lemuel Hayward, an eminent physician of Boston, from whom her son was named. Mrs. Shaw was a woman of vigorous powers, mental and physical. She lived to see and enjoy the success and honors of her son; dying under his roof in 1836, at the extreme age of ninety-four. How much of our history is crowded into that life, — the "Seven Years' War;" the War of Separation and Independence; the struggle for national unity, for commercial freedom; the birth and maturing to manhood of a great nation!

Lemuel was fitted for college in part by his father, and partly at Braintree. In 1796, at the age of fifteen, he entered the Freshman Class at Cambridge. During the winter vacations of the last three years, to help pay the college bills and relieve his father, he kept a district school. In the way of discipline and preparation for active life, we doubt not those winter vacations were worth more than any part of the college course. Indeed, no man thoroughly understands New-England life and manners who has not kept a district school and "boarded round."

The Class of 1800 had in it three, at least, marked men: Washington Allston, the painter-poet; the eloquent and saintly

Buckminster; and Lemuel Shaw. Other eminent men were President Bates, of Middlebury College; the Rev. Dr. Lowell; and Timothy Flint, whose letters from the valley of the Mississippi charmed everybody, forty years ago. Lemuel held a good rank in his class, and at commencement took part in a Greek dialogue with Timothy Flint.

Upon leaving College, Mr. Shaw was, for a year, usher in the Franklin, now Brimmer, School, in Boston. During the same year, he was a writer, or assistant editor, for the "Boston Gazette." The "Gazette" was an ardent supporter of the Federal party and politics. At this time the paper had several able contributors, — Robert Treat Paine, Jr., author of "Adams and Liberty," who wrote the dramatic articles and criticisms; Thomas O. Selfridge, soon to acquire so unhappy a distinction; David Everett, then at the bar, but afterwards first editor of the "Boston Patriot;" and, above all, Fisher Ames.

At the end of the year, Mr. Shaw commenced the study of the law with David Everett. Mr. Everett was a scholar and writer. He wrote Phi-Beta poems, dramas, essays political and literary; and on the fulfilment of the Prophecies, in which he assumes to prove, that the United States were distinctly alluded to by Daniel and St. John; and, more than all, he wrote the well-known poem, —

"You'd scarce expect one of my age
To speak in public on the stage."

Mr. Everett removed from Boston to Amherst, N.H.; and his student, Mr. Shaw, went with him, and there completed his term of study. Mr. Everett, who had been at the bar but two or three years when Lemuel entered his office, seems to have devoted himself to the study of almost every thing but the law. He soon after left the profession for more congenial pursuits, though, we believe, not more successful.

With what diligence Mr. Shaw pursued his studies under Mr. Everett, we cannot affirm; but, either then or at a later

period, he must have studied the law as a science, carefully and thoroughly. He had that familiarity with and wide comprehension of the principles of the law, and that facility and ease in their application, which come from patient and systematic study, and are seldom or never the result of practice only, studying for the case, cramming for the emergency.

Mr. Shaw was admitted to the bar of New Hampshire in September, 1804, and, in the following October, at a term of the Supreme Court at Plymouth, as an attorney in this Commonwealth. So great have been the legal products of New Hampshire, and her contributions to the bar of Massachusetts (Webster, Mason, Fletcher, Parker), and so large our debt, that we cannot afford to give her any credit for Lemuel Shaw. He was but a pilgrim and sojourner in that cradle-land of great lawyers.

The cases decided at the October term of Plymouth and Barnstable, 1804, are found in the first volume of the Massachusetts Reports. So that the professional life of Mr. Shaw begins with the system by which consistency, harmony, and symmetry were to be given to the then shapeless mass of our common law, — a work to which his labors were so largely to contribute.

Mr. Shaw settled in Boston. He had an office in the old State House with Thomas O. Selfridge. Whether there was a partnership, we do not understand. He testified at the trial, that he had an office with him. And that was his expression to the writer. After his trial and acquittal, Mr. Selfridge removed to New York, and the connection, if there was any, was dissolved.

Mr. Shaw did not find his way readily to large practice, or rise rapidly to distinction. But this was very far from being a misfortune. An early plunge into business would have made him a ready man; but time and opportunity for study, wisely improved, made him a full one. The qualities that readily attract business do not always secure and retain it.

If Mr. Shaw's progress was slow, every step was on solid ground. There was no slumping, no falling back. This was the secret of his success: if he had work to do, he did it as well and thoroughly as he could, and thus prepared himself to do the next better.

The first case in which his name appears in the reports is *Young* v. *Adams*, 6 Mass. 162 (1810). The amount involved was five dollars. The case was this: A note was payable in foreign bills. The promisor paid it, and the note was given up; but one of the bills given in payment was a counterfeit bill. The payee brought his action for the amount of the counterfeit note. Mr. Shaw put his defence on two grounds; first, that an action for money had and received would not lie; and, secondly,— the ground on which he principally relied,— that where there was no fraud and no express undertaking, and both the parties were equally innocent, *no* action would lie. The court, by Mr. Justice Sewall, said, "the two questions had been fully and ingeniously argued" by defendant's counsel, and, we hardly need to add, decided for the plaintiff. This was a small beginning; but perhaps the future Chief-Justice recalled the encouraging lines of Master Everett, —

> "Large streams from little fountains flow;
> Tall oaks from little acorns grow."

Mr. Shaw gave himself faithfully to the study and work of his profession, but not to the entire exclusion of other studies. A man cannot be a great lawyer who is nothing else. Exclusive devotion to the study and practice of the law tends to acumen rather than breadth, to subtlety rather than strength. The air is thin among the apices of the law, as on the granite needles of the Alps. Men must find refreshment and strength in the quiet valleys at their feet. For the comprehensive grasp of principles, for the faculty of applying and illustrating them; for the power to reach just conclusions, and to lead other minds to them, breadth of culture is necessary. Some other things are to be studied beside the reports and text-books.

The Law is not "a jealous mistress;" she is a very sensible mistress. She expects you to keep regular hours; but an evening with the Muses or the Graces does not awake her ire. The mind requires not only diversity of discipline, but generosity of diet. It cannot grow to full, well-rounded proportions on any one aliment. Mr. Shaw understood this, and read and studied and observed much outside of Coke and Blackstone.

He did not, we think, keep up his intimacy with the Greek and Latin. He could not have written a Greek dialogue as well at fifty as at nineteen. But he was at home with the English classics, and a master of the English tongue. He liked the elder English novelists and satirists, — Swift, De Foe, Fielding, and Smollett.

He was a student and admirer of Hogarth, and used to call our attention to minute details of his pictures, showing the artist's nice touch and the student's careful eye.

He was a close observer of nature, — of the trees of the forest, and of the wild flowers and their haunts. He had a strong taste and love of mechanics and of the mechanic arts. A new machine was a delight to him, and after court he must go down to the machine shop or manufactory to see it in operation.

He took great interest in the affairs of the town, the then town of Boston; was fire warden, school committee-man, Fourth of July orator, and, for several years, one of the selectmen.

He had a strong interest in the affairs of the State; was for eight years a Representative from the town of Boston in the General Court; and for three or four years Senator from Suffolk.

He was an ardent Federalist, and a firm supporter of the Federal policy, State and National, from the beginning of the century to the dissolution of the party; and, what is to his credit, he never apologized for it, in public or private.

But he had too catholic a spirit for a mere partisan. He was a working member of the Legislature, giving his time to the service of the Commonwealth in useful and practical legislation. We know of no training and experience for the young lawyer better than two or three winters in a State Legislature; provided he goes there to study and to work, and not merely to dabble in party politics or make "hifalutin" speeches.

Of the practical and useful character of Mr. Shaw's work one or two illustrations may be given. While a member of the Senate, he was chairman of the joint committee to whom was referred the petition for a city charter for the town of Boston. He drew up the charter and plan of city government. This was then a new work, and required not only familiarity with the working of our town governments, but foresight and constructive skill. The work was well done, and eminently successful in practical operation. Mr. Shaw always took a deep interest in the working of the new system of government, and in the general progress and welfare of the city.*

While a member of the House, he was appointed one of the commissioners to publish a new and revised edition of the General Laws of the Commonwealth. His associate in the commission was Professor Asahel Stearns, of Cambridge. How thoroughly well and faithfully this work was done, the older members of the profession have reason to gratefully recollect. This edition was in exclusive use from 1820 to the general revision of the Statutes in 1836, and is still indispensable for reference.

These details may, we fear, be uninteresting; but the labors of Mr. Shaw as School Committee-man, Selectman, Rep-

* He was, in a sense, *conditor urbis*. His large services to the city and to the Commonwealth, of which the city is the head, fairly claim some memorial of her respect and gratitude. Would it not be a graceful thing for the city to place a duplicate of Hunt's great picture of the Chief-Justice in Faneuil Hall?

resentative, Senator, in editing the statutes and framing the city charter, make up part of the discipline, training, and experience of the great magistrate. He obviously is not the great judge who has studied law only as a science and in the books, but who has also seen and felt how it works in the every-day business of life. The province of the judge is to find and apply to the varied exigencies of life and business, not an abstract, but the practical, working rule. The skill and discretion and tact requisite to do this well, are the fruit of business training got either upon the bench or before one gets there. Hence it is that some labor at *nisi prius*, — the putting the rules of law into harness, and seeing just how they draw, seems to be indispensable, not merely to the making, but to the preservation, of a good judge. A court without experience in trials, gets to be practically, as well as technically, a court of *errors*.

In the Convention of 1820, to revise the Constitution of the Commonwealth, Mr. Shaw was a delegate from the town of Boston.

The separation of the District of Maine from Massachusetts, and its admission into the Union as an independent State, seemed to render such revision necessary. The Convention was unquestionably the ablest body of men that ever assembled in the State. It was in constant session some eight weeks. The old Constitution had been adopted in the midst of the Revolution, and had been in operation for forty years. It is marvellous to see how slight the changes that were made: so wisely and firmly had the men of 1780 builded, that little modification or repair of their structure was required. It reflects the highest honor upon the men of 1780, that their work needed so little change; and upon the men of 1820, that they had the sense to see it, and to let well alone. Some tolerably sensible men think, that most of the changes since adopted tend to show the wise forbearance of the Convention of 1820.

The fact is, that even the Convention of 1780 had but few structural changes to make, when the Province of Massachusetts Bay became an independent Commonwealth. There was the agony of birth and separation; but the child was fully grown. States *do grow;* they are not *built up* with hammer and trowel, much less with "the stuff that dreams are made of."

Mr. Shaw took a less active part in the labors and debates of the Convention than we should have anticipated from his fitness for such work. When he addressed the Convention, it was upon practical subjects, — briefly, forcibly, and to the point. He spoke against a proposed amendment to make the stockholders of banks personally liable; in favor of the amendment giving authority to the Legislature to establish city governments; in favor of an amendment requiring a vote of two-thirds of each branch of the Legislature to remove a judge from office by address; against an amendment of the Bill of Rights, which should give to a prisoner a right to be heard both by himself and counsel, — a right, by the way, which has always been practically enjoyed by prisoners in this State, and which we have never known our courts to question.

It was while Mr. Shaw was a member of the House of Representatives of 1820–21, that the impeachment and trial of Judge Prescott took place. An admirable report of this trial was made by two then young but accomplished members of the bar. The trial, before the Senate of the Commonwealth, excited great attention, and was conducted with eminent ability on both sides. Judge Prescott was defended by an array of talent seldom enlisted in any cause, — Webster, Prescott, Blake, Hoar, and Hubbard. The House had many eminent lawyers among its members, and King, Lincoln, Baylies, Dutton, Fay, Shaw, and Leland were elected managers. The judge was impeached for maladministration in his office of Judge of Probate, by the taking of illegal fees.

Mr. Shaw was engaged throughout the trial, and argued the cause for the prosecution, in immediate reply to Mr. Webster's argument for the defence. The argument of Mr. Webster is among his collected works, and is familiar to the profession and to general readers. Mr. Webster had conducted the defence with great vigor, but defiantly, and with less discretion than marked his later efforts. The close of Mr. Webster's address has been often cited and recited, as a happy specimen of his eloquence. It made an impression upon the Senate: it would have made a deeper one upon a jury. We think the argument of Mr. Shaw may be read immediately after that of Mr. Webster, without feeling that there is any descent. It has not the rhetoric of Mr. Webster, — eloquence, if that is the better word; but it is robust, manly sense, in clear, vigorous English. Its tone and temper are judicial, as became the speaker's position. As this is, we believe, the only well-reported argument of Mr. Shaw while at the bar, we are tempted to cite a short passage at the opening, and a few sentences at the close, to show his style and manner:—

"Mr. PRESIDENT, — In common with the honorable managers with whom I am associated, I trust that I am sufficiently impressed with the magnitude and importance of the transaction in which we are now engaged. I am well aware of the dignity of the high tribunal before which I stand; of the duty of the constitutional accusers by whom this prosecution is instituted; of the elevated personal and official character of the accused; of the nature of the offences imputed to him; and the deep and intense interest which is felt by the community in the result of this trial. It is perhaps true, that these transactions may be recorded and remembered; that the principles advanced, and the decisions made, in the course of this trial, will continue to exert an influence on society, either salutary or pernicious, long after all those of us who, either as judges or as actors, have a share in these proceedings shall be slumbering with our fathers. And yet I do not know that these considerations, serious and affecting as they certainly are, can afford any precise or practical rule, either for the conduct or

decision of this cause. In questions of policy and expediency, there is a latitude of choice; and the same end may be pursued by different means. But in the administration of justice, in questions of judicial controversy, there can be but one right rule. Whether, therefore, the parties are high or low; whether the subject in controversy be of great or of little importance, — the same principles of law, the same rules of evidence, the same regard to rigid and exact justice, must guide and govern the decision. 'Thou shalt do no unrighteousness in judgment; thou shalt not respect the person of the poor, nor honor the person of the mighty; but in righteousness shalt thou judge thy neighbor,' — is an injunction delivered upon the highest authority, and enforced by the most solemn of all sanctions.

"Nor am I aware that powerful and animated appeals to your compassion or resentment can have any considerable or lasting influence. They may, indeed, afford opportunity for the display of genius and eloquence, excite a momentary feeling of sympathy and admiration, and awake and command attention. Beyond this, their influence would be pernicious and deplorable. If the charges brought against the respondent are satisfactorily proved, justice — that justice due to the violated rights of an injured community; that justice deserved by the breach of the most sacred obligations — demands a conviction, from which no considerations of compassion can or ought to shield him. On the contrary, if these charges are not substantiated, or do not import criminality, no feelings of resentment, no prepossessions of guilt, however thoroughly impressed, can prevent his acquittal."

Mr. Shaw thus closed his address: —

"Notwithstanding the length to which these remarks have extended, I am sensible that I have taken but an imperfect view of the details of this long and complicated case. But I address myself to experienced men, to intelligent judges, capable of estimating the qualities of conduct, and appreciating the force of evidence. We have no earnest invocation to make to the Judges of this honorable court, except that they will examine the case, now submitted to them, without fear, favor, affection, prejudice, or partiality; and pronounce their decision, not according to the momentary impulses of sympathy and compassion, but upon the invariable dictates of judgment and reason. If sensibility should usurp the seat of justice, and take the place of the understanding and judgment, laws would be unavailing, and all civil and social rights become fluctuating and uncertain. Justice might throw away

her balance, for it would be useless; and her sword, for it would be mischievous. If punishment and disgrace are to overtake the respondent, it is because punishment and disgrace are the natural, the necessary, and the inevitable consequences of turpitude and crime. The representatives of the people of this Commonwealth demand at your hands no sacrifice of innocence: they ask for no victim to their resentment; for they have none to gratify. If, applying the evidence to the law in this case, this court can, consistently with the conclusions of enlightened and inflexible judgment, pronounce the respondent innocent, these representatives will rejoice to find, that the reputation of this Commonwealth still remains pure and unspotted. But if their conclusions should be otherwise; if this court is satisfied that the respondent has abused the powers entrusted to him, disregarded the rights of others, and violated his high official duties, — the representatives of the people do earnestly hope, and confidently trust, that this high court, disregarding all consequences personal to the respondent, will pronounce such judgment on his conduct as will prove a salutary example to all others in authority, vindicate the honor and secure the rights of this Commonwealth, and enable them to transmit to posterity that unblemished reputation for purity, honesty, and integrity, in the administration of justice, which has hitherto been the ornament and glory of Massachusetts."

Mr. Shaw was in practice twenty-six years. He occasionally went into the other counties, but his business was chiefly confined to the Boston courts. He worked alone, with brief exception, for the first sixteen years, and then took into partnership Mr. Sydney Bartlett, who had been his student, and who is now so well known to the bar of the Commonwealth and in the Supreme Court at Washington.

Mr. Shaw travelled but little, was fond of home, but enjoyed greatly the meetings of the clubs of which he was a member, and other social gatherings. Pleasure was given as well as received. He had fine social qualities, large conversational powers and a fund of humor and quiet mirth.

He was twice married. His first marriage, at the somewhat mature age of thirty-seven, was with Eliza, a daughter of Josiah Knapp, Esq., a merchant of Boston. By her he

had two children, — a son and daughter. His second marriage was in 1827, with Hope, a daughter of Dr. Samuel Savage, of Barnstable, by whom he had two sons, Lemuel and Samuel, both members of the bar in Boston. Home was always a happy place to him; and he never was more attractive and delightful than at his own fireside.

Though he kept up his interest in public affairs, and was willing to go to the Legislature, he refused to go to Congress.

He wrote occasionally for the press, but on legal or constitutional questions. The article, for example, in the "North-American Review" for January, 1820, on "Slavery and the Missouri Question," which attracted much attention at the time, was from his pen. It is an able exposition of the malign character and the effects of slavery, social and political; resists its further progress; insists upon making, as a condition of the admission of Missouri, the provision, that slavery shall for ever be prohibited within it; and argues at length and with great ability, — we do not say conclusively, — that such a condition would have the force of compact, from which the State, after its admission, could not absolve itself. The convictions then expressed, as to the influence of slavery, social, economical, and political, and the duty of the North to oppose and resist its extension, were, we have reason to believe, never modified.

He also wrote an article in the "American Jurist" of January, 1829, in which he criticises and shows the unsoundness of the doctrine (a nod of Homer) stated by Chief-Justice Parsons, in *Storer* v. *Freeman*, 6 Mass. 438, that the colony laws and ordinances were annulled with the annulling of the charter under the authority of which they were made.

In this quarter of a century at the bar, Mr. Shaw built up a solid professional reputation, and acquired a valuable practice; not a great many cases, but important and leading causes, like *Charles-River Bridge* v. *Warren Bridge*, 7 Pick. 144, and *Blake* v. *Williams*, 6 Pick. 286, requiring hard

work and tough conflict. His examinations and arguments of legal questions were comprehensive and thorough, not neglecting the precedents, but getting down always to the principles which underlie them. His addresses to the jury (we speak from reputation) were forcible, earnest, logical; not brief; with little rhetoric, but that good in quality.

Upon the death of Chief-Justice Parker, in the summer of 1830, Mr. Shaw was appointed by Governor Lincoln his successor. The selection proved so wise and judicious, and reflected so much honor upon the Commonwealth, that one and another excellent gentleman has convinced himself, that it was by his suggestion, and through his influence, that the appointment was made. But no man better understood the wants of the place than Governor Lincoln, or who was able to fill it. He had practised under the great Chief-Justices, Parsons, Sewall, and Parker, and well understood that only a strong man could continue the line. He had been in both branches of the Legislature, in the Constitutional Convention, and on the bench of the Supreme Court, and knew all the leading members of the bar of the State. Mr. Shaw had been associated with him as counsel; had been with him in the Legislature, in the Convention; and had practised before him as judge. The idea that any person could find out some excellent lawyer, little known to the Executive, — who had been himself on the bench, — and get him appointed Chief-Justice of the Supreme Court, is simply absurd. The selection was made by Governor Lincoln, and is but one of many claims of this excellent magistrate to the respect and esteem of the Commonwealth.

It is true, however, that Mr. Shaw was unwilling at first to take the office; and a heavy pressure was brought to bear upon him before he consented to accept. He was then in the fiftieth year of his age, had won his way rather slowly, but surely, to eminent rank at the bar, and to a valuable business. He had acquired a moderate property, and was living happily

and to his taste. He had a growing family to support and educate. He knew a great place was to be filled, and was distrustful of himself. He felt that he ought to and must decline. In this exigency, Mr. Webster was requested by the Governor to confer with him, and urge his acceptance of the place.

Mr. Webster used to give a pleasant account of this conference. He found the future Chief-Justice smoking his evening cigar. Mr. Webster could not join him. It was a weakness of this otherwise notable man, that he could not smoke. So Mr. Webster talked while Mr. Shaw smoked. Mr. Webster made a regular onslaught upon him. Conceding the personal and pecuniary sacrifice, he pressed upon him, with the greater earnestness, the public want and demand, the dignity and importance of the office, and the opportunity it presented of winning an honored name, by valuable and enduring service to the State. Mr. Shaw was silent, showing, as Mr. Webster put it, the impression made upon him, only by the greater intensity with which he puffed. Mr. Webster could get no more at the first interview than the promise not to say No, before he saw him again. At a second interview, with the aid of Mr. Shaw's own reflections, and the urgency of leading members of the bar, and his own appeal, Mr. Webster got a reluctant assent. Mr. Webster used to add, that however the balance might be as to his other public services, he was sure the Commonwealth owed him a great debt for that labor of love; that his efforts (so he thought) had secured for the State, for twenty years, so able, upright, and excellent a Chief-Justice. It is not difficult to believe, that the earnest counsel and pressure of Mr. Webster, fresh from the field of the great debate in which he had shown himself the first of living orators, and for which the heart of New England so clave to him, should have had large, even decisive, influence upon the judgment and will of his friend. Be this as it may, it speaks none the less for the Chief-Justice, that the greatest of New-England statesmen should have felt it added

to his laurels, and to his claims upon the consideration of the people of Massachusetts, that he had aided in obtaining for her the services of such a magistrate.

Chief-Justice Shaw withdrew from the bench in the summer of 1860. Upon his retirement, an address was presented by the bar of the State, expressing profound admiration of his judicial labors, and personal esteem and veneration. He died on the 30th of March, 1861, in the eighty-first year of his age. His death was the tranquil close of a green and happy old age, the sunset, without a cloud, of a long, bright, and well-spent day, useful and vigorous even unto the twelfth hour. His death occurred just at the outbreak of the great rebellion. Though the bar and the courts united in tributes of respect and veneration to his memory, and arrangements were made for the delivery of an eulogy at a future day, the person selected for the duty having been for some time withdrawn into the public service, and the profession, as well as the public generally, absorbed in the interests, duties, and passions of the great conflict, the service was never performed. The writer hopes this imperfect sketch may be some atonement for that failure.

It remains for us to give some estimate of his judicial life and labors. In this estimate we cannot omit the element of time. He went upon the bench in his fiftieth year, and then worked, through the lifetime of a generation, with strength and vigor to the last. Some of his later judgments are, indeed, his best; are remarkable for their freshness, for the sagacity and grasp with which he apprehended the new exigencies of society and business, and applied and adapted the old rules of law to them. A striking and beautiful illustration may be found in the case of the *Commonwealth* v. *Temple*, 14 Gray, 69. This opinion contains a thorough consideration of the rights of travellers to the use of the highways, as affected and modified by the introduction and use of street railways.

It was written when the Chief-Justice was in the eightieth year of his age. Old men sometimes travel well in beaten paths; but this opinion strikes out new paths, and has the freshness, vigor, and constructive power of early manhood. We never read it without admiration of the good sense, tact, and grace even, with which the principles of the common law are moulded to new conditions, and the old fitted to the new, without seam. Lawyers in distant cities of the country, where street railroads were introduced, felt it to be fortunate that it should have fallen to the lot of Chief-Justice Shaw to lay open this new path.

We have to consider, also, how broad and varied was the field of his labor; that the work which, in Westminster Hall, would be apportioned among at least a half-dozen different courts, is with us united in one. Saving the jurisdiction in admiralty, his domain was the whole field of jurisprudence. To-day he would be sitting in a court of equity; to-morrow, in a court of errors; the next day, trying a capital indictment; the next, the probate of a will; then a question of marriage or divorce, then an appeal in bankruptcy, — for the insolvent law of Massachusetts was in substance and effect a bankrupt law. Add to these the new domain of constitutional law, growing out of our written frames of government, State and national, and the limitations which they were intended to impose upon legislative, judicial, and executive authority, in the State or nation; the supervision of all courts of inferior jurisdiction, as well as for many purposes of municipal corporations, and you get some idea of the extent and variety of the labors of the court over which he presided. When we think of these, we marvel not that mistakes are sometimes made, but that they are not more frequently made; and that the decisions of a court having so boundless a field to cultivate and reap, should, for more than sixty years, compare so well with those of courts whose jurisdiction and labors are limited to a single province of jurisprudence. The fact is, that the breadth and

comprehensiveness of the field give breadth of comprehension to the laborers; and cases are argued and settled less upon mere precedent and more upon principle, than in courts of more limited jurisdiction. If there is less accuracy of learning, there is less sticking in the bark, — more room for expansion and growth.

We may not omit to consider, in any estimate of the labors and services of the Chief-Justice for thirty years, the great changes which have taken place in the methods and instrumentalities of commerce and business, and what new applications and modifications of the principles of the common law became necessary to meet the new exigencies.

It is a mistaken notion, that, while every thing moves forward, the law can remain stationary, or lag far behind. In no department of science, art, or business, have change and progress been more marked, for the last thirty years, than in our jurisprudence. In the nature of things, this could not be otherwise. Whenever a new invention or discovery is made, a new application of science to the arts and business of life, the law must follow closely in its footsteps, to secure its results, or to secure society against them. The first puff of the engine on the iron road announced a revolution in the law of bailments and of common carriers. The use of the railroad for the carriage of passengers and freight has indeed created a new branch of law, made up to some extent of statute provisions, but to a far greater extent by the application and adaptation of the rules of the common law to the new condition of things. The railroad began to be used as Judge Shaw came upon the bench. How much his wisdom, foresight, and that clear comprehension of the principles of the common law which enabled him to separate the rule from its old embodiments, and to mould it to new exigencies, contributed to build up this law, to give it system and harmony, and a substratum of solid sense, is well known to the profession. We refer to a single case, — that of the *Norway-Plains Co.* v. *Boston &*

Maine Railroad, 1 Gray, 263, as an illustration and confirmation of our remark.

In the thirty years which Mr. Shaw presided in the Supreme Court, great changes were made in the jurisprudence of the State and the methods of administration; and he was constantly called upon to adapt himself to these changes, to reconcile the old with the new, and to assist in bringing them into order and harmony. As in the changes wrought in the law by new applications of science to intercommunication, he showed here also the strength and fertility of his resources, wherever principles and their application were involved.

We can but glance at some few of the changes in the law and its administration.

In the methods of administration, the most important change was the extension of the equity jurisdiction and powers of the Supreme Court. When the Chief-Justice came upon the bench, the equity powers of the court were limited to a few clearly defined subjects-matter, and the equity business and practice were small. Before he left the bench, its chancery jurisdiction covered the whole domain of equity, and was fast acquiring the qualities of Aaron's rod.

In the common-law courts, a new system of pleading, except as to real actions, has been introduced; as compared with the old system of special pleading, illogical and slipshod, without form or comeliness; but, after all, answering the ends of substantial justice better than the often over-nice and subtle logic of the old system. With all the imperfections of the new practice, the merits of the cause sooner or later struggle into light. It was not always so with the old.

There have been also radical changes in the law of evidence. The objections to the competency of witnesses, with the discussions of which the reports were crowded thirty years ago, as parties to the record, for interest direct or contingent in the suit, from want of religious belief, by reason of conviction for crime, even from the relation of husband and

wife, have been swept away, and, going only to the weight of the testimony, are transferred from the bench to the jury-box.

Another material change is the abolition of imprisonment for debt, and of what was justly called the old grab-law, under which the maxim, "*Vigilantibus non dormientibus subveniunt leges*," was translated "The devil take the hindmost;" and the substitution for them of one of the best systems of insolvency and bankruptcy known to jurisprudence.

Most material also have been the changes in the law of the domestic relations, and especially that of husband and wife; by the most important of which the wife owns and controls the property coming to her by gift, descent, or as the fruit of her own labor, — a gift of power likely to lead to more radical results. Add to these, changes in the law of divorce, by which new causes for the dissolution of the marriage bond have been allowed, and the facility of separation greatly increased.

Nor would we omit, in any sketch of our legal progress, to note the changes in the modes of trying causes at *nisi prius* and in the arguments of questions of law *in banc*. The manners of counsel have much less of asperity, and there is much less of personal controversy and identification of counsel with the passions and prejudices of their clients, than prevailed thirty years ago.

The rules requiring written or printed briefs, and limiting the time for the argument of questions of law, and the limitation of the time for addressing the jury, have compelled counsel to greater directness and condensation of argument. This last change may have been wrought somewhat at the expense of the eloquence of the bar. But this is not matter of serious regret. The court-room is a place for serious business, and not for rhetoric; and any eloquence that does not arise from a direct, logical, earnest, condensed presentation of the cause, may well be left for the platform and the stump.

We have alluded to these changes in the law of Massachusetts and its practice, not to discuss them, — we are indeed of opinion, that they have been wise and salutary, — but for the purpose of indicating what constant vigilance, activity, and fresh power were necessary to the discharge of the duties of the Chief-Justiceship for the period Mr. Shaw held the office. No mere following of the old ruts would answer. New paths had to be opened and fitted for travel, new hills of difficulty had to be cut through, new chasms bridged, new causeways over bog and morass constructed. In the comprehension of principles, new or old, and their adjustment and reconciliation, he was wise and strong. We do not think he took so kindly and readily to new forms of procedure; that he ever, for example, felt himself at home under the new Practice Act.

We must try to give a somewhat nearer view of the Chief-Justice on the bench. He was a good *nisi prius* judge. His perceptions were not remarkably rapid. He was not anxious to anticipate counsel, and see how summarily he could twist the neck of a cause. He was careful, thorough, systematic. He had a patient ear, — not merely the passive consent to listen, but the desire to be instructed in the facts and law of the case, no matter how inconsiderable the amount involved, or humble the parties or their counsel. He was no respecter of persons; and a good point, well put by the youngest member of the bar, told with the same effect as if by the leader. His rulings upon interlocutory questions and the admission of evidence were well considered and carefully noted. His charges to the jury were simple and clear; in difficult and complicated questions of law and fact, remarkably lucid, comprehensive, and forcible in matter and impressive in manner. He had a remarkable power of so stating and illustrating the principles of law applicable to the cause as to reach the minds of the jury. He was, in the best sense, impartial, and weighed with an even scale the merits of the cause. But he did not understand, that, to be impartial, he must have equal respect

for truth and falsehood, or for a sound proposition and a fallacious one; or that the important points must not be stated with sufficient distinctness and force to be fully understood.

It was a pleasure to try causes before him, if it ever is a pleasure to try causes: for your repose in his integrity, fairness, and sense of justice was never ruffled. He held the reins in his own hands, quietly, firmly, with no twitching or jerking, but so that the strongest men at the bar perfectly understood who presided.

The Chief-Justice brought to the hearing *in banc* the same patience, the same desire to be instructed. There never was a judge who more thoroughly understood and appreciated the importance of an able, upright, and learned bar in the administration of justice. He was very unwilling to decide any difficult cause that had not been thoroughly argued. He seemed to feel himself unqualified to decide it. He was reluctant even to depend upon briefs or written argument. He liked far better the thorough oral discussion by counsel, with an occasional probing and feeling, on his own part, for the roots of the matters in controversy.

In his anxiety to do right, and his desire for the most thorough investigation and consideration of causes, the decision was sometimes deferred, after all the questions had been thoroughly and exhaustively discussed and considered, and when further delay might work injustice. Delay in judicial proceedings is not indeed an unmixed evil. Some delay between the inception of a cause and the trial is good for the parties and the public. Many a bitter controversy has been spared, and the peace of many a family and neighborhood saved, by giving time for the passions of parties to cool and to pass in review before the judgment. And, when a cause has been tried, there is nothing that is so soothing to the failing party as the conviction, that he has been patiently heard, and his cause patiently and thoroughly considered. It is difficult to find the golden mean; but sometimes the delays

of the Chief-Justice, to those who did not understand the motive, looked like procrastination. If it was a failing, it leaned to virtue's side.

Chief-Justice Shaw had the highest sense of natural justice and equity; but he had also the profoundest sense of the necessity of uniform and stable laws. He saw in the law the rule of conduct for the judge as well as the parties; and that it was the province of the good judge, as Lord Bacon says, *jus dicere*, not *jus dare*. He did not believe that it was any part of his duty to bend a positive rule of law to any fancied or even real equity of the case. He appreciated the wisdom and safety of positive rules and restrictions, like those of the Statute of Frauds and the Statute of Limitations; knowing they must sometimes work injustice, but were necessary safeguards against far greater wrongs, and, in the long-run, wholesome and salutary. The subtleties and sentimentalities by which Chancellors have frittered away the Statute of Frauds, — or, as Mr. Justice Story would say, "rescued cases from its grasp," — did not commend themselves to his judgment. He thought it better to say, This is the rule the law-maker has prescribed.

He was a man of great firmness. It was not obstinacy, dogged conceit, unwillingness to confess error. He was singularly free from these. We never knew so great a man who had so little pride of opinion. His firmness was sense of duty; nothing could shake or disturb that. Such was the veneration for him, that no man would have ventured to suggest to him a consideration or motive outside of the line of duty. Though this firmness brought him into conflict with a strong and sensitive popular opinion on several occasions, we think it never impaired the public esteem and confidence. Men who knew Chief-Justice Shaw found it impossible not to respect him. The weight of his judicial character, the unusual confidence reposed in him, were among the effective practical arguments with the people against a change in the

tenure of the judicial office in 1853. A gentleman of our acquaintance, meeting a distinguished member of the Constitutional Convention held that year, inquired, "What are they doing at the State-House?" The reply was, "Discussing the question, whether Chief-Justice Shaw is a divine institution or a human contrivance." A fear was entertained that any change in the tenure of the office would result in his resignation. He was not a man to be content with any loss of the stability or dignity or rights of his court. When the salaries of the Judges of the Supreme Court were reduced by the Legislature in 1843, he refused to draw his salary. In 1844, the act reducing the salaries was repealed, and compensation made for the difference.

It was the habit, while Chief-Justice Shaw was on the bench, for the court, on the last day of the law term, or in long terms on Monday mornings, to deliver oral judgments in the cases already decided. Sometimes the reports of the opinions orally given sufficed. More frequently they were subsequently written out for the reporter. These were field-days for the Chief-Justice. He was never so great, and never felt to be so great, as in some of these oral judgments. His mind always seemed to be a little cramped by the pen. His oral style was not only more free, it was, to our apprehension, more finished and perfect than his written. He had less to do with cases. Having made himself master of the facts and the precise points in contest, he applied to their solution the law, with such ease and clearness, that his law did not seem to you a thing acquired, but part of the mind itself. Upon reading the judgments afterwards written out for the books, you felt a disappointment: a certain glow and finish were wanting. You could not help regretting, that the oral judgment could not have been preserved fresh and warm as it fell from his lips.

The judicial opinion for which he was most bitterly and severely reproached was that in the *Sims Case*, 7 Cush. 285.

There were portions of that opinion which did not command our assent. But it is not difficult to understand or to respect the position of the Chief-Justice on the subject. In conviction and feeling, he was firmly opposed to slavery and to its extension. His article in the "North-American Review" of 1820, shows the strength of these convictions. His opinions in *Commonwealth* v. *Ares*, 18 Pick. 193; *Commonwealth* v. *Taylor*, 3 Met. 72; *Commonwealth* v. *Fitzgerald*, 7 Law Reporter, — show clearly, that, for the cause of natural right, he was ready to go up to the extremest line of positive law. The slave brought here by his master was free. The slave brought here by an officer of the navy, whose landing on our coast was involuntary, was free. He would not permit the voluntary return of a minor slave. He felt that in the *Sims Case* the line of positive law was reached; that it was defined by authority he was bound to respect. His own conviction, the result of maturest consideration, was, that the law was authorized by the Constitution of the United States; and that Constitution he had solemnly sworn to support. On its face was written, "This Constitution, and the laws of the United States made in pursuance thereof, . . . shall be the supreme law of the land, and the judges in every State shall be bound thereby; any thing in the constitution and laws of any State to the contrary notwithstanding." The Chief-Justice was so simple, honest, upright, and straightforward, it never occurred to him there was any way around, over, under, or through the barriers of the Constitution, — that it is the only apology that can be made for him.

But, after all, the reputation of the Chief-Justice as a jurist must rest upon his reported judicial opinions. These, beginning with the latter part of the ninth volume of Pickering, extend to, and will include, the sixteenth volume of Gray. They make, perhaps, a third part of the matter in these fifty-seven volumes. Through these reports, he is well known to the profession in this country and in Westminster Hall; but

chiefly to the profession. Few men read the reports but lawyers. The bar constitutes the public of the bench. The bar only can fully appreciate the merits, or detect the shortcomings, of the judge. There is no escape from its judgment; and nothing but real merit secures its approbation. Pride of place, the air of gravity, parade of learning, spreading one's ideas thinly over a sheet of paper, solemn rhetoric, "wise saws and modern instances," avail nothing with good lawyers. They readily see whether the judge has got the matter in him, — such thorough comprehension of the principles of law, that they have ceased to be mere learning, and have become part of the mind's texture, — the analytic power which separates from the mass of immaterial matter the precise point at issue, and the trained judgment which applies to it the precise legal rule.

The judge is yet more severely tried and judged in the reports. There is time for more careful analysis and thorough weighing of every position taken; and, when an opinion blocks the way of strong counsel, the dissection is merciless. The Chief-Justice stood every test at the bar. No lawyer practising before him doubted whether there was a strong man on the bench. He will stand equally well in the reports. Take him for all in all, his is the first name in the judicial annals of Massachusetts. He had not, perhaps, the legal genius of Parsons or Jackson, but, it seems to the writer, larger grasp and wider scope.

His judicial opinions are thorough and exhaustive. They seldom rest on mere authority, but strike down to the hard-pan, — to the principle on which the cases rest. Considered as judgments merely, the range of discussion is sometimes too broad. The reader has to be cautious and careful to discern between what is necessarily involved in the decision, and what comes from the overflowing mind of the judge in the way of illustration and argument.

There was another quality of the mind of the Chief-Justice,

which always impressed us, — its forecast, a sort of prophetic forecast. It never said to itself, Settle this point, and "Sufficient unto the day is the evil thereof." His was "the wise discourse, which looks *before* and after." His mind was constantly reaching and feeling its way forward. His opinions show this habit of thought, and frequently contain intimations and suggestions which you find in subsequent cases have ripened into rules. A mind like this, it is obvious, would not be content simply to find a point upon which a case could be decided or turned off. It insisted upon grasping the principles involved, and wheeling the case into line.

We venture to affirm, that there are, in the reports of this country or of Westminster Hall, no more instructive and suggestive judicial arguments than those of Judge Shaw. When, in the course of professional investigation, we strike one of his leading opinions, there is a feeling of comfort, an assurance, that, if we do not find our point decided, we shall at least be refreshed and strengthened and directed for our farther journey. We know of no more valuable contributions to the illustration of the principles of the common law.

While the style of the Chief-Justice is vigorous, forcible, and copious, in illustration, — terseness and precision are sometimes wanting. Chief-Justice Shaw could not perhaps have written Vice-Chancellor Wigram's "Treatise on the Use of Extrinsic Evidence in the Interpretation of Wills," or the opinion of his own court in the case of *Brattle-square Church* v. *Grant;* in which the law assumes the beauty and precision of the exact sciences. But though there is here and there a little diffuseness in his style, sometimes repetition, the points are clearly and thoroughly stated, and vigorously enforced. He did not wind his way through the entanglement of glade and forest. He cut through a broad path, and let in the air and sunlight. It took time; but the way afterwards was open and clear, and its direction not to be mistaken.

It is, of course, impracticable to examine, within any rea-

sonable limits, even what may be called the leading opinions of the Chief-Justice. To be fairly judged, they must be carefully analyzed and studied. Examine almost any volume of the reports, and we may get some idea of the extent of the field in which he had to labor, of the thoroughness of his work, and of the largeness of his powers. We have before us the seventh volume of Cushing (1853). The volume contains at least three leading and most important causes, in which the opinion of the Court was given by the Chief-Justice, — *Commonwealth* v. *Alger*, *May* v. *Breed*, and the *Sims Case*. We shall very briefly refer to them.

Commonwealth v. *Alger* was an indictment for constructing and maintaining a wharf extending beyond the lines fixed by the statutes of the Commonwealth for Boston Harbor. The defendant (Alger) was, under the colony ordinance, the owner of the fee in the flats on which the wharf was built.

The acts of the Legislature fixing the lines of the harbor, and restraining the owners of the flats from building beyond those lines, had made no provision for compensation to the owners, on account of such restriction. The case was argued for the defendant with great ability and force, upon the ground, that the act in question was an exercise of the right of eminent domain, and the taking of private property for public use; and that, no compensation having been provided, the act, as against the defendant, was invalid, as contravening the Bill of Rights of Massachusetts, Art. 10, and the provision of the Constitution of the United States, forbidding a State to pass a law impairing the obligation of contracts.

The case opened two important questions, — the rights of owners of land bounding on the sea, to the flats over which the tide ebbs and flows; and, secondly, the power of the Legislature to regulate the use and enjoyment of these rights. The careful reading of this opinion can, we think, leave no doubt as to the profound learning of the Chief-Justice, his grasp of principles, or his great power of illustrating and applying them.

In *May* v. *Breed*, the Chief-Justice discusses the question, whether a discharge, under the English bankrupt law, of a debt due to a citizen of Massachusetts, but contracted in England and payable there, is a bar to an action on the debt in that State; and, holding that the law of the place where the contract is made and to be performed gives to it its character, measures its obligations, and settles when and how it shall be terminated and discharged, pronounces the judgment of the Court for the defendant.

Sims' Case, as before observed, is an elaborate discussion of the constitutionality of the Fugitive-Slave Law of 1850.

Though the Chief-Justice presided over a local tribunal, these cases indicate how comprehensive was its jurisdiction, and that no court where the common law is administered could be called upon to discuss and settle questions of greater magnitude and difficulty. There is no court on either side of the Atlantic upon which the opinions in *Commonwealth* v. *Alger* and *May* v. *Breed* would not have reflected new lustre and honor.

The manners of the Chief-Justice upon the bench were quiet, simple, dignified. There was, however, an occasional austerity and roughness, which, to those who did not know him, looked like acerbity of temper. It was not so. The Chief-Justice had a kind heart, which would not willingly give pain.

But the manner was a fault. The practice of the law has trials and vexations enough, without adding any that are unnecessary. The utmost courtesy and respect are required from the bar to the bench; and courtesy is a reciprocal virtue. The example, too, of so great a judge is dangerous, and may tempt others to the fault, without the great qualities that redeem it. It was a wise prayer of good Thomas Fuller, to be saved from the errors of good men.

If we might, for a moment, and for a closing word, forget the critic and speak as the friend, it would be to say, that,

great as was the judge, the man was greater than the magistrate, — Lemuel Shaw than the venerable Chief-Justice. A truer man, indeed, did not grace his generation. With a little roughness of exterior, he was like the nuggets of California, — through and through solid gold.

But the man bowed to the magistrate. With the largest sense of equity, he was the servant of the law he was set to administer, and obeyed its mandate. With the most generous love of freedom, and hatred of oppression, he stood unflinchingly by the Constitution he had sworn to support. With the soundest judgment, with masterly powers of reasoning, and, in discussion, with a subtlety of logic seldom equalled, he had literally no pride of opinion, but retained to the last the docility of childhood, — the ever-open and receptive and waiting spirit, into which wisdom loves to come and take up its abode. With a stern sense of justice, he had the tenderness of a woman; and while the magistrate pronounced the dread sentence of the law, the man was convulsed with grief and sympathy.

With a firm trust in God, with a constant sense of his presence, looking to him for guidance and support, nothing could move him from the path of duty. He stood in his place, and the waves of passion broke at his feet.

As man and as judge, he bore the severest test, the closest scrutiny. The nearer you got to him, the more thoroughly you knew him, — the greater, wiser, better man and magistrate he appeared to you. Great on the bench and in the books, it was in the consultation room or in conversation by his own fireside that you first understood and felt the variety and affluence and extent of his resources.

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ERRATA.

Page 16, *note*, bottom line, read "iii. 309–11."
„ 18, line 7, for "illegible signature or mark" read "Mamoho."
„ 68, line 18, for "subjects-matter" read "subject-matters."
„ 108, line 13 from bottom, for "President of Bowdoin College" read "pronounced at Bowdoin College."
„ 126, *note*, line 6 from bottom, the ") " should be placed after the word "pages" instead of after the figures "45."
„ 208, line 19 from bottom should read, "But these seem to be blown over."
„ 292, line 5, for "intersets" read "interests."
„ 298, line 18, read, "the *copies* from the original autographs."
„ 326, line 8 from bottom, read "a quarter past 1 night."
„ 327, line 12 from bottom, "1637–3 " should be placed against the line above.
„ 333, *note*, 8th line from bottom, read, "an extract from the manuscript journal, &c., communicated by Frederic Kidder, Esq."
„ 444, top line, for "Ohio" read "Illinois."